No. 50276-3-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

DAVID B. CATLIN,

Respondent/Cross Appellant

vs.

RAEANN PHILLIPS, personal representative of the Estate of HEIDI M. CATLIN,

Appellant/Cross Respondent.

BRIEF OF RESPONDENT/CROSS APPELLANT

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Assignments of Error

I. The trial court erred when categorizing permissive waste versus commissive waste.

II. The trial court erred in not awarding damages while the property was uninhabitable.

III. The trial court erred in the interest rate awarded on the judgment in favor of Respondent.

Issues Pertaining to Assignments of Error

I. Whether a party who allows a personal residence to become a drug house that results in massive amounts of damages that render the home uninhabitable for an extended period of time and necessitate extensive repairs has committed permissive waste or commissive waste?

II. Whether a party should be compensated for the reasonable rental value of the premises while said premises are uninhabitable?

III. Whether a trial court can alter the statutory rate of interest on a damages award?

B. COUNTERSTATEMENT OF THE CASE

David B. Catlin (Brad) and Heidi M. Catlin (Heidi, or decedent) were married in 1991. (RP v.1, p.45) Heidi worked in the medical field, exercised regularly and kept an immaculate home and was a generally fun person to be around. (RP v.1, pp.45, 46)

Sometime in the mid-2000s, Heidi developed an addiction to pain medications following shoulder surgeries that did not go as planned. She quit working. (RP v.1, pp.53, 53, 54, 55) She became a bit more reclusive but still maintained herself and the home well. (RP v.1, pp.54, 55)

Around the same time she was developing her addiction, the real property located at 168 Smokey Valley Road, Toledo, Washington, was gifted to Heidi (RP v.1, p.49), and Brad, who had more than 15 years of experience in the construction field, remodeled this home extensively, just as he had the two prior homes they shared. (RP v.1, pp.46, 47, 48, 49, 50, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70) His employer advanced the costs of remodeling, and a mortgage was taken out when the work was completed to reimburse Brad's employer. (RP v.3, pp.441, 442)

Although medical coverage was available to treat Heidi's addiction issues, she never availed herself of this insurance. (RP v.1, p.53, 78, 79)

In March 2012, Brad began moving from the property and by October 2012, was completely moved out. (RP v.1, pp.58, 59)

In July 2013, Brad retained the services of Scott Hamilton, a licensed real estate appraiser, for the purposes of establishing a value of the real property as part of the divorce proceedings between Heidi and Brad. Although the home appeared cluttered in places, no significant damage was observed. (Exs. 10, 11, 12; RP v.2, p.256; RP v.1, p.72) The day the appraiser appeared in July 2013 was the only date that Brad had been to the property since moving out. (RP v.1, pp.72, 73)

On December 13, 2013, a Decree of Dissolution was entered by the Superior Court. It awarded the Decedent a judgment in the sum of $220,402 to offset sums in Plaintiff's retirement account. It allowed Heidi to remain in the property until February 28, 2014, at which time Brad was to receive the property so that the real property could be sold. The underlying encumbrance of $177,000 was to be paid off, the judgment in favor of Heidi paid and the remaining balance divided equally between Brad and Heidi. Until the property was sold, Brad was to pay to Heidi $500 per month in support and provide a $2,000 moving allowance to Heidi. No allowance was made for interest on the judgment. (Exs. 1, 23)

Around the same time that the Decree of Dissolution was being

entered, Heidi reported water damage in the utility room, kitchen and bathrooms in the home to an insurance adjuster. (Ex. 14) Brad was unaware of this. (RP v.2, p.303) Heidi was paid to repair the water damage. (Ex. 14) However, she either failed to make the repairs or they were performed negligently, causing more water damage to the property. (RP v.1, pp.104, 105, 126, 127, 129, 130)

February 28, 2014 came and went, and Heidi refused to move despite repeated requests by Brad. (RP v.1, p.83) On October 9, 2014, Heidi died. (RP v.1, p.83)

On October 10, 2014, Raeann Phillips demanded that Brad pay the money judgment immediately. (RP v.4, p.616)

Brad went to the property on October 21, 2014 to serve eviction papers on Bryan Deardon (RP v.1, p.84), someone that the decedent had allowed to move onto the property for some period of time, perhaps as early as July 2013 or before. (RP v.1, p.73; RP v.4, p.521)

The property was, in perhaps what can only be described as an incredibly serious understatement, heavily damaged.

On November 3, 2014, the personal representative filed a probate notice to creditors indicating that the first date of publication was November 15, 2014. (Ex. 37)

On November 3, 2014, Brad obtained possession of the property.

Brad secured the property and drained water from the piping. (RP v.2, pp.300, 301)

Garbage filled the home, shop, barn and yard. Moldy, filthy dishes filled the kitchen. Rotten food filled a freezer. Car parts were strewn throughout the yard, shop and barn. Bags of garbage and debris were everywhere inside the home. Hundreds upon hundreds of drug needles and vials were found inside and outside the home. Dump truck loads of garbage had to be hauled away. (RP v.2, pp.185, 186, 187, 220, 229, 230; RP v.1, pp.85, 95, 96, 97, 102, 103, 109, 110, 116, 118, 133, 155)

Cat feces and urine was found extensively inside the home and attached garage, as well as below the home in the crawl space. (RP v.2, pp.185, 186, 286, 287; RP v.1, pp.104, 106, 115, 116, 134, 137) Cats were able to access the interior of the home through cut out holes in the doors and knocked out vents beneath the home. (RP v.1, p.98, 106, 116, 117; RP v.2, p.292) The smell burned the nose and eyes. (RP v.2, p.180; RP v.1, p.134)

Walls inside the home were covered in mold, urine, blood, crayon, paint splatter and/or an unknown sticky substance as well as having holes knocked into them, and insulation ruined. (RP v.1, pp.109, 110, 111, 112, 113, 114, 117, 125, 130, 131, 132, 134, 138, 139, 141,

142, 150, 151, 153) Walls and concrete outside the home were splattered in paint or damaged. (RP v.1, pp.86, 97, 98, 99, 101) Doors were kicked in. (RP v.1, p.85) Holes were drilled into an outside wall. (RP v.1, p.100, 101)

None of the kitchen appliances were operable. (RP v.1, pp.103, 107, 108) Cupboard doors were warped. (RP v.1, p.108) The heat pump no longer worked (RP v.1, pp.99, 100; RP v.2, p.223) and one of the pumps to the pump house was burned out. (RP v.1, p.88) Electrical systems had been tampered with. (RP v.2, pp.225, 226, 317) Smoke alarms were dismantled. (RP v.2, p.315)

Carpeting and trim were ripped up. (RP v.1, pp.110, 116, 136) Vinyl flooring had bubbled up. (RP v.1, p.125) Hardwood flooring had warped. (RP v.1, p.128) Light switches were broken. (RP v.1, p.114) Cabinets were covered in mold. (RP v.1, p.143) Toilets had busted. (RP v.1, p.147) Plumbing was ripped up or leaking. (RP v.1, p.118; RP v.2, p.289) Flooring underlayment was ruined. (RP v.1, pp.126, 134, 135, 157) Windows and screens were broken and damaged. (RP v.1, pp.86, 98, 100, 102, 106, 115) Gutters were torn off the home. (RP v.1, p.98)

Gravel was scraped off the driveway and removed. (RP v.2, pp.221, 222, 227, 228)

Someone had improperly installed a stove into the shop, charring

the siding and roofing. (RP v.1, pp.86, 87, 96; RP v.2, pp.214, 215, 216) An electrical box and wiring were improperly installed. (RP v.1, p.86; RP v.2, p.317)

All the metal hardware had been removed in the barn and the metal roof bent in an apparent attempt to remove it. (RP v.1, p.87) A drainage ditch near the barn had been filled in. (RP v.3, pp.377, 393)

Brad attempted to have contractors give him estimates on the cost to repair so that he could timely file a creditor's claim. They all refused. (RP v.2, pp.304, 306) As Aaron Craig testified, the extensive damage done to the property made giving any estimate extraordinarily difficult and, more likely than not, changed circumstances would require billing on a time and material basis. (RP v.2, pp.168, 169, 170)

Brad had nearly two decades in the construction industry. He was a carpenter, an estimator, and a project foreman, coordinator and supervisor. Using this background, he was able to pull together a scope of work. As all general contractors do, he broke down the project into component parts, obtaining estimates from subcontractors for portions of the job that general contractors typically do not perform. (RP v.2, pp.303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 319, 320) As Aaron Craig testified, he would have prepared something similar. (RP v.2, pp.170, 171, 172, 173, 174)

This estimate formed the basis of the creditor's claim filed in the estate. (Ex. 17; RP v.3, pp.422, 423, 424, 425, 426, 427, 428, 429)

Confronted with a heavily damaged piece of real property and lacking funds to hire contractors, (RP v.2, pp.304, 305) Brad turned to hiring friends and family who agreed to be paid their regular pay, but would wait until the property sold to be reimbursed, (RP v.2, pp.326, 327) and credit cards and checks were used for everything else as the repairs went along. (See generally RP v.2, v.3; and Exhibits 6.1 through 6.4, 6.17 through 6.97, 6.99 through 6.118)

The property remained uninhabitable until approximately August 2015. (RP v.3, p.385) In the meantime, Brad continued making mortgage payments, tax payments and utility payments. (RP v.3, pp.386, 387)

Although lacking any background in construction and any pressure to allow or disallow the creditor's claim, on September 4, 2015, the personal representative chose to disallow the creditor's claim in its entirety rather than do any investigation as most good fiduciaries would do. (Exs. 3, 38; RP v.4, pp.525, 526, 527, 528)

At trial, Brad introduced into evidence the receipts he paid out for the repairs to the property, (see generally RP v.1, v.2 and v.3) while he, Janelle Tiegs, Roger Fraidenburg and Mike McEwen testified as to what

work they and some others did, how long they worked and their hourly rates. (See generally RP v.1, v.2 and v.3) Brad also testified as to what work still needed to be done and how much he estimated that work would cost. (RP v.3, pp.410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 434, 435)

In rendering the court's judgment, the judge elected to use the receipts incurred by Brad, as well as the hourly rates for each of the persons rendering services (with the exception of Janelle Tiegs, whom he reduced). For work that still needed to be done to the property, the judge used estimates from Brad, figures offered by Defendant's expert, Nadyne Tauscher, or a mid-point between the two figures. (See Verbatim Report of Proceedings, pp.687, 688, 689, 690, 691, 692)

The trial court found only the holes in the two doors and the improperly installed stove to be acts of commissive waste. (See Verbatim Report of Proceedings, p.692)

C. ARGUMENT

I. Standard of Review.

> When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law. . . . Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true.

Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 555-556, 132 P.3d 789 (2006) (citations omitted).

An appeals court reviews "only those findings to which appellants assign error; unchallenged findings are verities on appeal." Further, an appeals court views "the evidence in the light most favorable to the prevailing party and defer[s] to the trial court regarding witness credibility and conflicting testimony." *Id.* at 556.

II. The trial court made no error when it allowed Respondent's testimony as to value of services as it was within Respondent's area of expertise.

ER 702 allows testimony by experts if their "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Such a witness may be "qualified as an expert by knowledge, skill, experience, training, or education." They may testify "in the form of an opinion or otherwise."

ER 703 provides that "facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be

admissible in evidence."

ER 705 provides that a trial court judge may require the disclosure of the underlying facts.

"The hearsay and best evidence rules are important, but they should not be applied to prevent an expert witness giving in a reasonable way the basis of his opinion." *State v. Wineberg*, 74 Wn.2d 372, 382, 444 P.2d 787 (1968).

A "trial court may allow the admission of hearsay evidence and otherwise inadmissible facts for the limited purpose of showing the basis of the expert's opinion." *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wash. App. 229, 275, 215 P.3d 990 (2009). The main question is whether the testimony is "helpful to the trier of fact." *Id.*

"Once the basic requisite qualifications are established, any deficiencies in an expert's qualifications go to the weight, rather than the admissibility, of his testimony." *Keegan v. Grant County Public Utility Dist. No. 2*, 34 Wn. App. 274, 283, 661 P.2d 146 (1983). Contractors have long been recognized as being experts in the value of buildings. *Mahan v. Springer*, 155 Wash. 98, 99, 100, 283 P. 667 (1930).

> We now hold that, when an expert is allowed to testify to a valuation opinion which is in part based on facts, which would normally be hearsay and inadmissible as independent evidence, the trial court may in its discretion allow the expert to state such facts for the purpose of

> showing the basis of the opinion. The exclusion of such evidence, however, must be based on a sound exercise of discretion and not on an erroneous application of the hearsay and best evidence rules.

Wineberg, 74 Wn.2d at 384.

The trial court specifically found that Respondent was an expert in the field of home construction and estimating and that his testimony was helpful to the trier of fact. Respondent carefully and methodically laid forth the basis of his estimate of the damages to the real property using his extensive background. No error was made in admitting Exhibit 17.

III. The trial court did not err in admitting the receipts attached to an ER 904 notice.

It should be noted that exhibits 6.17 through 6.97, both inclusive, and 6.99 through 6.118, both inclusive, were initially attached to Respondent's ER 904 Notice. Bills, receipts and invoices are precisely the kinds of things the rule is designed to allow in order to expedite the admission into evidence of certain documents.

"The intent of the rule is to reduce the time and expense associated with presenting witnesses that are typically necessary to provide a foundation for the authentication of documents. Documents itemized in the . . . rule are of the kind that are routinely admitted."

5c Wash. Prac., *Evidence Law and Practice* §904.1 (5th ed., see footnote 2, 1992 drafters' comment).

Allowing a general hearsay objection of bills and receipts would negate the purpose of ER 904 as they are part of "the many hearsay-type documents targeted by the rule." *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 257, 944 P.2d 1005 (1997). "Just as ER 904 requires the proponent of evidence to examine it carefully before offering it, the rule requires the opponent to make specific objections to a finding of admissibility. To allow general, blanket objections to all designated documents would defeat the purpose of the rule, which is to expedite the admission of evidence." *Hendrickson v. King County*, 101 Wn. App. 258, 268, 2 P.3d 1006 (2000).

In fact, "[a]bsent any substantive evidentiary reason to exclude . . ." this evidence, a trial court would abuse its discretion by disallowing this evidence as there would be "no tenable basis for its decision." *Fox v. Mahoney*, 106 Wn. App. 226, 230, 22 P.2d 839 (2001).

Here, the trial court properly admitted the evidence pursuant to ER 904 (and awarded attorney fees for Appellant's unreasonable objections). (RP v.3, pp.400, 401; Verbatim Transcript of Proceedings, March 31, 2017, pp.32-33)

Beyond which, Washington has long recognized that receipts are

evidence of payment. *Puget Sound Nat. Bank v. Biswanger*, 59 Wash. 134, 139, 109 P. 327 (1910) (superseded on other grounds by statute).

IV. The trial court did not err in its base calculation of damages.

Damages must be proved with reasonable certainty.

> However, "certainty" applies to the fact of damage rather than to the amount. In addition, doubts about certainty are generally resolved against the party who breached the contract. This is because a party whose breach has forced the injured party to seek compensation in damages should not be allowed to profit from the difficulty in establishing the amount of damages. A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of fact.

25 Wash. Prac. (*Contract Law and Practice*) §14:10.

It is only error to allow recovery if no evidence has been presented as to the amount of damages. *Id.*

"A party who has established the fact of damage will not be denied recovery on the basis that the amount of damage cannot be exactly ascertained." *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 703, 9 P.3d 898 (2000).

> "[T]he doctrine respecting the matter of certainty, properly applied, is concerned more with the fact of damage than with the extent or amount of damage." . . . Once the fact of loss is proved with reasonable certainty, uncertainty or difficulty in determining the amount of the loss will not prevent recovery. . . . Although mathematical certainty is

> not required, the amount of damages must be supported by competent evidence. . . . Evidence of damage is sufficient if it gives the trier of fact a reasonable basis for estimating the loss and does not require mere speculation or conjecture.

Holmquist v. King County, 192 Wn. App. 551, 559-560, 368 P.3d 234 (2016) (citations omitted).

Once damage has been established, reference can be made to "market value, established experience, or direct inference from known circumstances." *Id.* at 561.

Generally, when real property has been damaged, the question becomes one of whether the damage is temporary or permanent. If damage to real property is permanent (not capable of being repaired), the measure of damages is diminution of value. If damage to real property is temporary (capable of being repaired), cost of restoration is the measure of damages (capped by the total value of the improvement prior to damage). *See generally, Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 541-545, 871 P.2d 601 (1994), *abrogated by Phillips v. King County*, (136 Wn.2d 946, 968 P.2d (1998).

"The fact that the cost of restoring property to its prior condition exceeds the amount by which the land's value has been diminished does not necessarily make those repair costs unreasonable." *Id.* at 544. Further, "[t]o limit repair costs to diminution in value is to either force a landowner to sell property he wishes to keep or to make repairs partly out

of his own pocket." *Id., quoting* D. Dobbs, *Remedies* § 5.1 at 317 (1973).

"However, reasonable repair costs cannot be without limits. We agree with other jurisdictions that hold the plaintiff may recover cost of repairs in excess of the diminished value of the property, so long as the repair costs are less than the total pre-injury value of the property." *Id.*

This can be illustrated in *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wash.2d 447 (2005). In that case, evidence was presented that the value of a barn destroyed by fire was $400,000; the barn contributed $300,000 to the value of the property; and that it would cost $500,000 to rebuild the barn. *Id.* at 451, 452. The Supreme Court upheld an instruction by the trial court that the cost to replace a structure may be an appropriate measure of damage, even if it exceeds the value added to the property, so long as the amount is not "unreasonably disproportionate to the diminution in market value of the property because of the loss. . ." *Id.* at 454.

The Supreme Court generally upheld the lesser of cost of restoration or diminution in value. However, which measure of damages to apply is up to the trier of fact, keeping in mind that the purpose of awarding damages is to place the injured party as near as possible to the position he would have been in had the wrongful act not occurred. *Id.* at 459.

It should be noted that the appellate court, whose ruling was upheld by the Supreme Court, noted:

> Thus, the supreme court has approved the award of restoration costs even when such costs exceeded the diminution in value of the damaged property in order to provide adequate compensation to the victim without providing a windfall.

117 Wn. App. 260, 269, 70 P.3d 972 (2003).

This is consistent with Restatement (Second) of Torts §929 (1979): "If one is entitled to a judgment for harm to land . . . and not amounting to a total destruction of value, the damages include compensation for (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred. . ." "In addition to damages relating to the loss of the use of the land and discomfort and annoyance." *Id.*

Comment *b* to the Restatement notes that restoration cost is normally the measure of damages unless the cost is disproportionate to the diminution of value. However, even here, there is an exception: "There is a reason personal to the owner for restoring the original condition." The example cited: "If a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire

value of the building." *Id.*

Washington has adopted this reasoning. *See*, *Allyn v. Boe*, 87 Wn. App. 722, 733, 943 P.2d 364 (1997).

Accordingly, the trial court had more than ample means for calculating damages via testimony of Respondent, the receipts and other proof admitted into evidence.

V. The trial court did not err when abating interest.

It should be kept in mind that this action came about as a direct result of the decedent breaching her obligations pursuant to the decree of dissolution entered by the trial court.

Generally speaking, in a dissolution matter a court tries to render a just and equitable decision. *In re Marriage of Larson and Calhoun*, 178 Wash. App. 133, 138, 313 P.3d 1228 (2013).

"[I]n exercising its discretion in a dissolution case a court may 'reduce the rate or eliminate interest entirely on deferred payments which are part of the adjudication of property rights.'" *In re Marriage of Davison*, 112 Wash. App. 251, 259, 48 P.3d 358 (2002) (*quoting*, *Berol v. Berol*, 37 Wn.2d 380, 383, 223 P.2d 1055 (1950)).

Because a trial court has broad discretion in establishing what is fair, an appellate court reviews the trial court's decision based on "manifest abuse of discretion." *Larson and Calhoun*, 178 Wash. App.

at 138.

The dissolution decree envisioned decedent residing at the property for a few months, her tendering the real property back to Respondent, normal wear and tear excepted, and that Respondent would then promptly fix up the property for sale. Once sold, a loan on the property would be paid, the judgment would be promptly satisfied and both parties would split the remaining balance. Accordingly, it would appear from a fair reading of the decree of dissolution that the trial court made no error in not specifying an interest rate. It is thus Appellant who failed to timely seek modification under CR 60 or an appeal of the decree.

Appellant cites *Rufer v. Abbott Laboratories* for the concept that the decedent could destroy the very asset that gave rise to the judgment in the first place. However, it will be noted that in *Rufer*, the plaintiffs did not attempt to reduce Abbott Laboratories' physical assets to rubble. Abbott merely chose not to pay a malpractice judgment while the plaintiffs pursued whether certain records could be sealed. Consequently, not paying a judgment when the assets are fully intact while another party seeks remedies unrelated to the judgment (as was the case in *Rufus*) can be distinguished from a party's not paying a judgment because the other party has destroyed the asset needed to pay the judgment (as was the case

here).

> A trial court has discretion whether equity requires an equitable grace period. This discretion is to be exercised in light of the particular case's facts and circumstances. Because the trial court has broad discretionary authority to fashion equitable remedies, such remedies are reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons.

Recreational Equipment, Inc. v. World Wrapps Northwest, Inc., 165 Wash. App. 553, 559, 266 P.3d 924 (2011).

Here, the trial court concluded the decedent severely damaged the real property that secured her judgment. The trial court concluded that it would be inequitable to allow the decedent to destroy the real property AND then turn around to collect interest on the judgment from the date of entry of the decree of dissolution.

VI. The trial court erred when it classified much of the damage as permissive waste.

RCW 64.12.020 provides that if a tenant of real property commits waste, any person may maintain an action at law for damages against the tenant. "[I]f the plaintiff prevails, there shall be judgment for treble damages, . . . and the court . . . shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court."

> "Waste," as understood in the law of real property and as variously defined by this court, is an unreasonable or

> improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury. It is the violation of an obligation to treat the premises in such manner that no harm be done to them, and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act. [Citations omitted.]
>
> Waste may be either voluntary or permissive. Voluntary waste, sometimes spoken of as commissive waste, consists of the commission of some deliberate or voluntary destructive act, such as pulling down a house, or removing things fixed to and constituting a material part of the freehold. Permissive waste implies negligence, or omission to do that which will prevent injury, as, for instance, to suffer a house to go to decay for want of repair or to deteriorate from neglect.

Dorsey v. Speelman, 1 Wn. App. 85, 87, 459 P.2d 416 (1969), citing *Graffell v. Honeysuckle*, 30 Wn.2d 390, 401, 191 P.2d 858, 865 (1948).

Generally, voluntary (commissive) waste is covered by the statute, but permissive waste is not. *Id.* Also, waste committed by the tenant, or through an agent, or as an aider and abetter, would all be covered by this statute. *Id.* at 89. For example, if the decedent allowed others who were her guests, invitees or others, to commit waste, the decedent would be guilty of waste herself.

The question is whether the destructive act was voluntary. If so, then treble damages must be awarded. *Graffell*, 30 Wn.2d at 401, 402 (tearing out wiring, flooring and a toilet is waste). The manner under which something is done can be a "deliberate or destructive act." *Fisher*

Properties, Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 848, 849, 726 P.2d 8 (1986) (noting the manner in which shutdown of equipment caused damage). Allowing pets to use carpet for urination and defecation causing damage to the carpeting and subflooring has been held to be waste. (*See Three and One Co. v. Geilfuss*, 178 Wis.2d 400, 409, 504 N.W.2d 393 1983, "The urine-rotted subflooring indicates a habitual problem. The tenants, by allowing their pets to use the unit as a litter box, acted unreasonably.") Faulty wiring has been held to be waste (*see Thomas v. Thomas*, 661 N.W.2d 1 (S.D. 2003)), as has allowing broken windows. Vandalism has been found to be waste. *See Ault v. Dubois*, 739 P.2d 1117 (Utah App. 1987).

Here, it appears that the trial court confused the notion of allowing someone who resided with the tenant to damage the property as being permissive. However, as noted in *Dorsey v. Speelman*, 1 Wn. App. 85, 87, 459 P.2d 416 (1969), voluntary destructive acts of guests are imputed to the party in legal possession of the premises. *See also*, *Ault v. Dubois*, 739 P.2d 1117 (Utah App. 1987).

This Court should remand for a calculation of damages for the commissive waste that occurred as a result of the decedent turning the house into a drug house and for an award of attorney fees.

VII. The trial court erred in not allowing damages for the rental value of the home while it was uninhabitable.

Generally speaking, when a party's breach causes the delay in the use of the property, an owner may recover damages based on the rental value of the property. *Holmquist*, 192 Wash. App. at 565.

Here, the Respondent testified that the home was uninhabitable until August 2015. The trial court should have allowed the mortgage payments, tax payments and electricity payments proven at trial as an element of damages.

VIII. The trial court erred in the interest rate set on Respondent's judgment.

Respondent believes that the action was based on statute as well as breach of a marital agreement, and not tort, thus allowing interest at the rate of 12%. RCW 4.56.110(4), RCW 19.52.020. However, in the event that this Court finds the action in tort, then RCW 4.56.110(3)(b) would require interest at the rate of 5.75%. as was pointed out by Appellant (although it should be pointed out that by the time Appellant got done arguing about every finding, the interest rate had increased to 6% by the time judgment was finally entered). (See CP p.288) The trial court mistakenly said 5.7%, and since Appellant had already filed her appeal before entry of judgment, the trial court simply left the interest

rate at what he stated. (see Verbatim Report of Proceedings dated April 14, 2017, p.702) The trial court had no discretion to do that.

D. CONCLUSION

In conclusion, Respondent respectfully requests that this Court:

1. Affirm the admission of Exhibit 17 as within the trial court's discretion as allowed by ER 702, 703 and 705;
2. Affirm the admission of the receipts as within the trial court's discretion as allowed by ER 904;
3. Affirm the trial court's base calculation of damages within the range of evidence presented and within the trial court's discretion;
4. Affirm the trial court's order abating interest on the judgment entered in the decree of dissolution as within the trial court's inherent powers to grant equitable relief;
5. Reverse the trial court's decision as it relates to the repairs needed because the home was turned into a drug house by the decedent as inconsistent with RCW 64.12.020 and remanding the case for a re-calculation of damages and an award of attorney fees;
6. Reversing the trial court's decision not to award

damages associated with costs incurred in maintaining the home while it was uninhabitable; and

7. Reversing the trial court's entry of interest as inconsistent with RCW 4.56.110.

DATED: September 20, 2017.

Respectfully submitted,

MICHAEL A. CLAXTON, WSBA #25095
Of Attorneys for Plaintiff

CERTIFICATE

I certify that on this day I caused a copy of the foregoing BRIEF OF RESPONDENT/CROSS APPELLANT to be mailed, postage prepaid, hand-delivered and emailed to Defendant's attorney, addressed as follows:

Meredith Ann Long
Attorney at Law
1315 - 14th Avenue
Longview, WA 98632
Email: attorney.m.long@gmail.com

DATED this 20 day of September 2017, at Longview, Washington.

Heidi Thomas

WALSTEAD MERTSCHING PS

September 20, 2017 - 4:23 PM

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